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No. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

W. DARRELL ZANG and
LOUIS PORTER, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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## QUESTIONS PRESENTED

Whether the traditional standard of "arising under" as expressed in §211(b)(2) of the Economic Stabilization Act is to be applied in order to invoke federal question jurisdiction to require the Temporary Emergency Court of Appeals to review energy-related cases wherein criminal penalties are also involved.

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## PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

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Petitioners, W. Darrell Zang and Louis Porter, seek certiorari through this petition in order to bring before this Honorable Court the opportunity to clarify yet another concept of appellate jurisdiction in an "arising under" provision of a federal statute plainly granting such review power to the Temporary Emergency Court of Appeals (TECA). Petitioners respectfully pray that a Writ Of Certiorari issue to review the final judgment of that court handed down and entered on June 23, 1981.

## OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals was a final judgment in denying a petition for rehearing on a previous order[1] by that court on May 22, 1981, dismissing Petitioners' appeal of the judgment by the United States District Court for the Northern District of Oklahoma. The District Court's decision denied a motion for judgment of acquittal, a motion for a new trial, and a motion in arrest of judgment from the conviction and sentence of Petitioners on sixteen counts of Title 18 U.S.C. felony offenses. An appeal of this action is also pending in the United States Court of Appeals for the Tenth Circuit (No. 80-2227). On July 20, 1981, the Tenth Circuit stayed consideration of that case pending the outcome of this Court's determination on this Petition for Certiorari.

## JURISDICTION

The judgment of the Temporary Emergency Court Appeals was entered on June 23, 1981. This Petition for Certiorari is filed within thirty days of that date, pursuant to a special statutory provision. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and §211(G) of the Economic Stabilization Act, as amended. *See also* Em.App.R. 32.

## STATUTORY PROVISIONS INVOLVED

Section 211(b)(2) of the Economic Stabilization Act provides:

> Except as otherwise provided in this Section, the Temporary Emergency Court of Appeals shall have

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[1] This brief order appears in the appendix hereto, along with the opinion for which rehearing was sought.

exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this Title or under Regulations or Orders issued thereunder. Such appeals shall be taken by the filing of a Notice of Appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

## STATEMENT OF THE FACTS

Petitioners Louis Porter and W. Darrell Zang, were indicted in the United States District Court for the Northern District of Oklahoma on April 2, 1980, and arraigned on April 10, 1980, on sixteen separate criminal counts including conspiracy,[2] mail fraud,[3] wire fraud,[4] and racketeering,[5] on allegations of misdealings relating to crude oil supplies and sales regulated by the Federal Energy Administration (FEA) and the Department of Energy (DOE).

The real basis for controversy was the Emergency Petroleum Allocation Act (EPAA),[6] and concomitant regulations,[7] with commensurate criminal provisions built into the Act.[8] While the United States has contend-

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[2] 18. U.S.C. §371.

[3] 18 U.S.C. §§2 & 1341.

[4] 18 U.S.C. §§2 & 1343.

[5] 18 U.S.C. §§2, 1962(a), and 1963. On the same date the indictment was returned the District Court granted a Government motion to restrain Defendants from alienating any property purported to be subject to confiscation under the indictment.

[6] 15 U.S.C. §751 *et seq.*

[7] 10 C.F.R. §§212.54; 212.71-74; 210.92(a) & (b); 211.67; 212.131(b)(1); 42 C.F.R. 41565; 62897; 64956; and 43 C.F.R. 26540.

[8] 15 U.S.C. §754.

ed that these EPAA provisions were not properly part of the indictment, without them there would have been insufficient evidence to support an indictment.[9]

On April 10, 1980, Defendants entered pleas of not guilty to all allegations. Thirty days later, Defendants filed motions to dismiss the indictment on the grounds that the Government was selectively prosecuting them in attempting to circumvent the misdemeanor provisions of Title 15 under the EPAA by concurrently alleging felony violations of Title 18 general criminal statutes. After Government reply briefs on May 15, 1980, and Defendant's response briefs on May 29, 1980, plus an additional Government response on June 3, 1980, and supplemental briefs by Defendants on June 4, 1980, the District Court on July 18, 1980, denied the motions to dismiss.

The Defendants filed an appeal of this denial before the Temporary Emergency Court of Appeals on July 28, 1980. On August 1, 1980, the Government moved to

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[9] Relying entirely upon the audits of the crude oil business conducted by nationally renowned accounting firms, Petitioner Porter was not informed until late 1978 of any prospective violations of the EPAA. Upon being informed of these problems Porter *sua sponte* informed the DOE, inviting its investigation and taking positive steps to insure not only that disclosure was made to the DOE and SEC, but also that repayment of possible overcharges was made from a special contingency fund of some $7,000,000 established specifically for that purpose. Moreover, Porter directed that a full disclosure report be made to the DOE and he requested a DOE audit of his past crude oil dealings to investigate possible EPAA violations. Ironically, it was upon this document that the Government predicated its investigation, indictment and conviction of Porter and Zang. This conduct was not that of a criminal with *mens rea* or even a participant with *locus penitentiae*; rather it was that of a candid and efficient businessman seeking to comply with a complex and ever-changing set of lugubrious regulations.

dismiss that appeal and after full and extensive briefing and oral argument TECA, on March 5, 1981, declined to consider the interlocutory appeal because of lack of jurisdiction.

During the course of this interlocutory appeal, in October, 1980, after a jury trial of two and one-half weeks' duration, Defendants were convicted on all counts. Defendants' post-trial motions were denied on November 7, 1980, and the court entered judgment of conviction and sentenced each defendant to concurrent prison terms of five years on each count, fines totalling $49,000 and forfeiture of certain property.

Appeals from the District Court's final order of judgment and conviction were timely taken simultaneously to TECA and the United States Court of Appeals for the Tenth Circuit. On April 1, 1981, the Government moved to dismiss the pending appeals in TECA based on the language of the March 5, 1981, TECA opinion dismissing the interlocutory appeal.

On April 17, 1981, Defendants filed before TECA a memorandum in opposition to the Government's dismissal motion, together with a motion for summary reversal and remand.

Following the Government's response to these filings by the Defendant, TECA, by opinion and order dated May 22, 1981, dismissed the pending substantive appeals, finding that TECA lacked jurisdiction. On June 5, 1981, Appellants Zang and Porter filed a petition for rehearing *en banc*; however, the court denied that petition on June 23, 1981. It is from that denial that this petition for certiorari is made.

## REASONS FOR GRANTING CERTIORARI

This case presents another complex question of jurisdiction which is "among the most difficult and subtle that federal courts are called upon to make." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 375 (1959). This microcosmic repetition of the various "arising under" concepts is all the more reason for this Court to grant certiorari. Here, as before, "the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself. . . ." *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 382 (1884). This Court, like all federal courts, has jurisdiction to decide whether it has jurisdiction, *Philbrook* v. *Glodgett*, 421 U.S. 720, 721 (1975), and to review the jurisdiction of an intermediate federal court.

The issue presented, therefore, is whether, in the context of §211 of the Economic Stabilization Act, the United States Temporary Emergency Court of Appeals has jurisdiction to consider both energy-related issues and collateral criminal charges "arising under" the plain meaning of that phrase in the statute. More precisely put, the question here is whether the Temporary Emergency Court of Appeals correctly interpreted the phrase "arising under" in §211(b)(2), by taking a "limited approach [which] is unnecessarily grudging," *United Mine Workers of America* v.*Gibbs*, 383 U.S. 715, 725 (1966) — a tact which this Court has previously rejected. Petitioners submit that the lower Court was incorrect in its interpretation of federal question jurisdiction.

### I. The Traditional Application of the "Arising Under" Standard Embraces This Statutory Provision

The classic test for interpreting the "arising under" standard under the Constitution[10] was set down by Chief Justice Marshall:

> If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitutional law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incident to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union, extends effectively and beneficially to that most important class of cases, which depend on the character of the cause.* * * We think, then, that when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the [federal appellate] courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

*Osborn* v. *Bank of the United States,* 9 Wheat. [22 U.S.] 738, 824 (1824).

This remedial interpretation of federal jurisdiction has been maintained in an unbroken line of cases since then. "As we stated in *Bell* v. *Hood,* 327 U.S. 678, 685 (1946), 'the right of the petitioners to recover under their complaint will be sustained if the . . . and laws of the United States are given one construction and will be defeated if they are given another. For this reason the . . . Court has jurisdiction.' And see *Bock* v. *Perkins,*

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[10] Article III, §2.

139 U.S. 628, 630, (1891)." *Wheeldin* v. *Wheeler*, 373 U.S. 647, 649 (1963).

To be sure, in *Osborn* and its progeny, the Court was considering *original* jurisdication by the United States District Courts. However, the lineage of *appellate* jurisdiction can be traced back equally as far. In a classic appellate jurisdiction opinion, Chief Justice Marshall also wrote that, "A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohens* v. *Virginia*, 6 Wheat. [19 U.S.] 264, 379 (1821). *See also Smith* v. *Kansas City Title and Trust Co.*, 255 U.S. 180 (1921).

Petitioners are aware, of course, that in these landmark cases the issue was more properly one arising under the *Constitution* of the United States rather than one arising under any federal *statute*. *Romero* v. *International Terminal Operating Co.*, 358 U.S. at 379 n. 51; *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 504 (1900).[11]

If, therefore, the high threshold constitutional standard is not to be applied to statutory interpretation, it is likewise not easy to determine what precise statutory standard is applicable since "[t]he relevant cases do not supply a clear and logical test for establishing when a case arises under federal law." *Town of Greenhorn* v. *Baker County*, 596 F.2d 349, 351 (9th Cir. 1979). It is

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[11] It is emphasized that Petitioners here, in addition to seeking an interpretation of the statue in question, also contend that TECA's incorrect interpretation of that statute has denied them due process of law under the Fifth Amendment to the United States Constitution.

sufficient to say that the existing tests as to when a case arises under the federal question jurisdiction of this or other constitutional or statutory courts, are vague. *See* Note, *The Outer Limits of "Arising Under,"* 54 N.Y.U.L.Rev. 978, 979 (1979).

Petitioners suggest herein that the threads from the existing tests may be plaited into a sufficient jurisdictional nexus to provide a requirement that the intermediate court below assume jurisdiction over their claim. Whatever analytical distinctions exist between the constitutional and statutory standards of the federal question doctrine, if sufficient nexus can be shown, Petitioners may justifiably rely on yet another of Chief Justice Marshall's maxims:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. The judiciary, cannot as the legislature may, avoid a measure, because it approaches the confines of the constitution.* * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

*Cohens* v. *Virginia,* 6 Wheat. [19 U.S.] at 404. Petitioners submit that no less a standard may be applied to a temporary intermediate federal court. The ruling by TECA that it lacks jurisdiction over these tandem energy and criminal issues seeks to separate Damon and Pythias, contravening the specific intent of Congress in enacting this legislation.[12] TECA's inopportune opinion on jurisdiction was one which tended to repeat uncritically language from earlier decisions with insufficient

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[12] See further discussion of congressional intent below at pp. 18-22.

attention to and analysis of the case and statute which were actually before the court. That decision, based on the proferred standard herein, should be vacated and remanded in the wake of this Petition for Certiorari.

Whatever the differing standards, it must be conceded that there exist "some elements of analytical similarity" between the *Osborne* case and this and interstitial cases since then. *See Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 481-82 (1957) (Frankfurter, J. dissenting). In interpreting §211 pursuant to that analytical similarity, Petitioners propose the following standard be applicable:

> Jurisdiction "arises under" a statute of the United States, when the issue presented forms an original ingredient flowing directly from that statute which is a substantial, not a frivolous, claim of jurisdiction flowing from congressional authorization.

#### *A. Original Ingredient*

This element is directly traceable to Chief Justice Marshall's inquiry as to whether "[t]he question forms an original ingredient in [the] cause." *Osborn* v. *Bank of the United States,* 9 Wheat. [22 U.S.] at 824. He predicated that requirement on the finding that "when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal appellate] courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823.

Here under the appropriate regulatory statute in Title 15, both civil and criminal penalties arise directly under the plain meaning of that law and in so doing form "original ingredients" of the complaint on which

Petitioners were convicted. There can be no doubt that under this interpretation, jurisdiction runs to the court to which Congress has by statute granted appellate jurisdiction. TECA therefore erred in refusing to assume jurisdiction over all these concomitant issues.

### *B. Directly Related*

Likewise the issue presented must be one arising directly under the statute, not one which is collateral; one which is necessary and not one which is merely possible. *See Gully* v. *First National Bank in Meridian,* 299 U.S. 109, 118 (1936). *See also North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F.2d 229, 233 (2d Cir. 1978) ("whether federal law is a pivotal issue in the case"); *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Trans. Authority,* 582 F.2d 444, 450 (8th Cir. 1978) ("jurisdiction must be a paramount and not a collateral issue"); *League to Save Lake Tahoe* v. *B.J.K. Corp.,* 547 F.2d 1072, 1074 (9th Cir. 1976) (" 'basic' . . . and 'necessary' "); *Robison* v. *Wichita Falls & North Texas Community Action Corp.,* 507 F.2d 245, 249 (5th Cir. 1975) ("founded directly upon federal law").

A more basic interpretation of this requirement was provided by Justice Holmes who observed that "a suit arises under the law that creates the action." *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U. S. 257, 260 (1916). Other cases have elaborated on that primary principle by holding that "a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon which the determination of the result depends." *Shulthis* v. *McDougal,* 225 U.S. 561, 569 (1912). Holmes' formula has been found to be "more

useful for inclusion [in jurisdiction] than for [the] exclusion for which it was intended." *T.B. Harms Co.* v. *Eliscu,* 339 F.2d 823, 827 (2d Cir. 1964). *See also Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 450 (1955) (plurality opinion of Frankfurter, J.). Thus, the conjunctive issues presented in the Petitioners' case — civil and criminal penalties under the same or related statutes — present issues arising *directly* under the requisite jurisdictional statute. They are not subject to dismissal for want of *jurisdiction* because they form "an entirely separate and distinct class of cases" from that comprehended by the statute. *See Romero* v. *International Terminal Operating Co.,* 358 U.S. at 367. Nor would granting jurisdiction in this case be a situation of "follow[ing] the ascent [of jurisdiction] far enough, [so that] countless claims of right can be discovered to have their source or operative limits in the provisions of the federal statute." *Gully* v. *First National Bank in Meridian,* 299 U.S. at 118.[13] An appeal properly arising, which may or may not be lost later on the merits is not to be dismissed *ab initio* on jurisdictional grounds.

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[13] Although it must be said that if federal law grants the substantive right, it may also be held that a federal remedy may be implied from that right. *E.g., Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388, 392 (1971); *J.I. Case Co.* v. *Borak,* 377 U.S. 426, 433-34 (1964); *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.,* 372 U.S. 682, 695-96 (1963). Petitioners here claim a jurisdictional right predicated directly on the statute, rather than seeking to raise jurisdiction by anticipating a defense. *See Phillips Petroleum* v. *Texaco,* 415 U.S. 125, 127-28 (1974); *Louisville and Nashville Ry. Co.* v. *Mottley,* 211 U.S. 149, 152 (1908). *See generally* Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law,* 115 U.PA.L.REV. 890 (1967).

### *C. Substantiality*

Jurisdiction will likewise lie when the claim founded directly upon federal law is a substantial one. This requirement of substantiality has been a touchstone for consideration of cases at the appellate level for virtually all of our judicial history. As an independent issue, the substantiality doctrine is "a statement of jurisdictional principles," *Hagans* v. *Lavine,* 415 U.S. 528, 536, 538 (1974), and "is a legal question open to independent examination on appeal." *Molina-Crespo* v. *Califano,* 583 F.2d 572, 574 (1st Cir. 1978). Appellate courts will therefore attach jurisdiction if a claim "raises in sharp form the question whether a suit like this 'arises under the . . . laws . . . of the United States'. . . ." *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U.S. 667, 671 (1950). A federal question presented, therefore, "must be substantial and must form an integral part of the complaint." *Screven County* v. *Brier Creek Hunting & Fishing Club, Inc.,* 202 F.2d 369, 370 (5th Cir. 1953). *See also Shulthis* v. *McDougal,* 225 U.S. at 569. The final determinant in this vein is that "if the plaintiff really makes a substantial claim under an act of Congress, there *is* jurisdiction *whether the claim ultimately be held good or bad.*" *The Fair* v. *Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913) (emphasis added).

### *D. Not Frivolous*

The basic determinant, therefore, of whether an issue is substantially raised under a federal question claim of jurisdiction is that it be "not frivolous." Just as the federal claim must be a substantial one, so too jurisdiction will lie unless it is "wholly insubstantial," *Baily* v. *Patterson,* 369 U.S. 31, 33 (1962); *Levering & Garrigues Co.* v. *Morrin,* 289 U.S. 103, 105 (1933)

("plainly unsubstantial"); *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 288 (1910) ("obviously frivolous"); *McGilvra* v. *Ross,* 215 U.S. 70, 80 (1909) ("no longer open to discussion"); *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 579 (1904) ("so attenuated and unsubstantial as to be absolutely devoid of merit").

Thus the test for denial of jurisdiction "is a rigorous one and if there is any foundation of plausibility to the claim, federal jurisdiction exists." *South Park Square Limited* v. *City of Jackson,* 565 F.2d 338, 342-43 (5th Cir. 1977). *See also Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 70 (1978) (" 'patently without merit' "); *McLucas* v. *De Champlain,* 421 U.S. 21, 32 (1975) ("insubstantial"); *Walsh* v. *Louisiana High School Athletic Association,* 616 F.2d 152, 156 (5th Cir. 1980) (" 'obviously without merit' "); *Wiley* v. *National Collegiate Athletic Assn.,* 612 F.2d 473, 477 (10th Cir. 1979) ("wholly insubstantial or obviously frivilous"); *Payne* v. *Government of District of Columbia,* 559 F.2d 809, 823 (D.C. Cir. 1977) ("wholly unsubstantial and frivilous"); *Dreyfus* v. *Von Finck,* 534 F.2d 24, 28 (2d Cir. 1976) ("so attenuated and insubstantial as to be absolutely devoid of merit"); *Standage Ventures, Inc.* v. *State of Arizona,* 499 F.2d 248, 250 (9th Cir. 1974) ("not sufficiently substantial").

Unless, therefore, "the alleged claim under the . . . federal statute clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous," *Bell* v. *Hood,* 327 U.S. at 685, and where the petition does in fact raise serious questions, both of law and fact, the appellate court can decide the issue only after it has assumed jurisdiction over the controversy. Again, "the right of

the petitioners to recover under their complaint will be sustained if the . . . laws of the United States are given one construction and will be defeated if they are given another. For this reason the . . . Court has jurisdiction." *Id.*

In asserting that jurisdiction lies under §211(b)(2), Petitioners rely on the well-settled premise that legislation must, if possible, be given a meaning that will enable it to survive. *E.g., United States* v. *Rumley,* 345 U.S. 41, 45 (1953). Petitioners submit that this Court, and the intermediate court, need go no further than the plain meaning of the statute. "In the wise distribution of governmental powers, this Court cannot do what a President sometimes does in returning a bill to Congress. We cannot return this provision to Congress and respectfully request that body to face the responsibility placed upon it by the Constitution to define the jurisdiction of the lower courts with some particularity and not to leave these courts at large." *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. at 484 (Frankfurter, J., dissenting). As Chief Justice Marshall observed in *Cohens,* "A case . . . may truly be said to arise under . . . a law of the United States, whenever its correct decision depends on the construction [of that law]." *Cohens* v. *Virginia,* 6 Wheat. [22 U.S. at 379. Plainly, "[a] suit arises under the law that creates the cause of action." *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U.S. at 260.

### *E. Congressional Authority*

Here jurisdiction arises over the construction of the federal law creating the action. *See PAAC* v. *Rizzo,* 502 F.2d 306, 312 (3rd Cir. 1974). That law must be read in its entirety and from the general scope of Congressional intent; "we must not be guided by a single sentence or a

member of a sentence, but look [instead] to its object and policy." *United States* v. *Heirs of Boisdore,* 49 U.S. 113 (1849). *See also United States* v. *St. Regis Paper Co.,* 355 F.2d 688, 693 (2d Cir. 1966) (" 'how, one supposes, [the legislative scheme] *** would appear to a "reasonable interpreter" ' ").

Here the factor which subjected Petitioners to original liability in this case was an alleged violation of the EPAA, a premise not merely incident to the criminal code but inherent in the original statute itself. Thus, this case "arises emphatically under the law; the act of congress is its foundation . . . The Act itself is the first ingredient in the case — is its origin — is that from which every other part arises." *Osborn* v. *Bank of the U.S.*, 9 Wheat. [22 U.S.] at 824. For in this case, as with the Bank of the United States in the *Osborn* case, the FEA and DOE are creations and creatures of federal law. Thus, the law itself provides the basic triggering mechanism under which Petitioners are subject to the jurisdictional authority of the trial court, and on appeal as of right, Fed.R.App.P. 4(a), entitles them to invoke the jurisdiction of the appropriate appellate court. That appropriate court is the Temporary Emergency Court of Appeals, not the United States Court of Appeals for the Tenth Circuit. It is only "[i]n the *absence* of such triggering allegations in the complaint, [that] the [Circuit] Court of Appeals has jurisdiction over the appeal." (Emphasis added). *St. Mary's Hospital of East St. Louis, Inc.* v. *Ogilvie,* 496 F.2d 1324, 1326 (7th Cir. 1974) (interpretation of §211(b)(2)).

There can be no doubt here, of course, that Congress had the authority to create the special jurisdiction inherent in this statute; nor, Petitioners submit, can there be any doubt that Petitioners are entitled to invoke

that jurisdiction. Faced with the prospect of the "ascent of appellate jurisdiction" originating with the *Osborn* case, Congress could have chosen to act otherwise, or chosen an alternative phrase in plotting the jurisdictional curtilage, *e.g.*, "arising upon;" *see* 11 U.S.C. §110(a)(6); *Management Investors* v. *United Mine Workers of America,* 610 F.2d 384, 390-91 (6th Cir. 1979); or "arising out of;" *see Blue Bird Body Co.* v. *Ryder Truck Rental,* 583 F.2d 717, 726 (5th Cir. 1978); *Sands* v. *Union Camp Corp.,* 559 F.2d 1345, 1347 (5th Cir. 1977). But as Justice Frankfurter pointed out, "The traditional interpretation . . . is that the federal jurisdiction under the 'arising [under]' clause . . ., though limited to cases involving potential federal questions, has such flexibility that Congress may confer it whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question." *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. at 471(footnote omitted). And it is well-settled that, "[i]n every other case, the power is to be exercised in its original *or appellate* form, or both, as the wisdom of congress may direct." *Osborn* v. *Bank of the United States,* 9 Wheat. [22 U.S.] at 820 (emphasis added).

Clearly the traditional notions of federal question jurisdiction apply to §211(b)(2) as fully within the generally accepted and plain meaning of the time-honored federal phrase "arising under" federal law. The Temporary Emergency Court of Appeals therefore erred in finding that this principle was not broad enough to infuse authority into its jurisdictional see.

**II. The Purpose Of Congress Was Clearly To Provide Broad Federal Question Jurisdiction To TECA In Order To Address The Energy Crisis And To Serve The Purposes Of Judicial Economy**

As with the concept of "protective jurisdiction,"[14] Congress has the legislative power under Article I to pass a statute, such as the one *sub judice,* granting federal jurisdiction and that jurisdictional statute is itself a "law of the United States" within Article III, under which a federal question may arise. It is all the more applicable in those areas of the law in which Congress has an articulated policy of regulating a field such as energy. *Cf.* Mishkin, *The Federal "Question" Jurisdiction of the District Courts*, 53 COL.L.REV. 157, 184-96 (1953).[15]

Here the purpose of Congress in enacting this jurisdictional authority is clear from the face of the legislative history. TECA was created "[t]o funnel into one court *all* the appeals *arising out of* the District Court and thus gain a consistency of decision." S. Rep. No. 92-507, 92d Cong., 1st Sess., *reprinted in* 1971 U.S. CODE. CONG. & AD. NEWS 2283, 2292 (emphasis added).

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[14] Discussed below at pages 20-22.

[15] The fact that both civil and criminal penalties under the EPAA and criminal penalties under Title 18, form the basis for Petitioners' appeal, does not place it outside the ken of the jurisdiction of TECA since both these appeals "form a separate but parallel legal ground for relief also sought in a substantial claim based on federal law[s]." *United Mine Workers* v. *Gibbs*, 383 U.S. at 722. Even were it otherwise, TECA under the circumstances should have bifurcated the energy and criminal provisions and considered the former pursuant to its very *raison d'etre*, rather than rejecting the appeal *in toto.*

In addition, the basic dictates of judicial economy require that all issues "arising under" the jurisdictional grant of authority of §211(b)(2) be heard and adjudicated in the same proceeding. These pragmatic considerations of jurisdiction have been traditionally upheld in federal case law. *See Shulthis* v. *McDougal,* 225 U.S. at 569; *League to Save Lake Tahoe* v. *B.J.K. Corp.,* 547 F.2d at 1074.[16] With respect to TECA's appellate jurisdiction in particular, this Court has previously placed its imprimatur on this interpretation, ruling that one of the primary functions of TECA jurisdiction is to assure "uniform interpretation of the substantive provisions of the stabilization scheme." *Bray* v. *United States,* 423 U.S. 73, 74 (1975).

Manifestly, therefore, the will of Congress was plainly enunciated in §211(b)(2) and to allow the stringent jurisdictional interpretation by TECA to stand "would contravene the whole trend of jurisdictional legislation by congress, disregard[ing] the effect of the functioning of the federal judicial system and [would] distort the limited procedural purpose of the . . . Act."

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[16] One noted authority suggests that the relevent pragmatic considerations include such matters as: "the extent of the case load increase for federal trial courts if jurisdiction is recognized; the extent to which cases of this class will, in practice, turn on issues of state or federal law; *the extent of the necessity for an expert federal tribunal* to handle issues of federal law that do arise; the extent of necessity for a sympathetic federal tribunal in cases of this class." Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law,* 115 U.PA.L.REV. at 916 (emphasis added). Petitioners submit that Congress was mindful of all of these factors in creating the Temporary Emergency Court of Appeals and in enacting its jurisdictional authority under the EPAA and that no significant additional case load would develop by recognizing the purpose and intent of Congress in creating this broader jurisdiction.

*Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. at 673-74.[17]

Moreover, as noted above, the federal courts may assume "protective jurisdiction" over collateral issues within the same jurisdictional grant. *See National Mutual Insurance Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949). Thus, pursuant to Chief Justice Marshall's opinion in the *Osborn* case, where he ruled that Congress could authorize a bank chartered by it to sue in federal court even though non-federal issues were involved, so too Congress' infusion of jurisdictional power to TECA under the EPAA enables that court to take collateral criminal issues under its own protective jurisdiction. Consequently, when Congress passes a statute granting federal jurisdiction, that jurisdictional statute itself is a "law of the United States" under which, as here, a federal question may arise.[18]

[17] Although Petitioners claim that appellate jurisdiction here is required, rather than "permitted," *Gully* v. *First National Bank in Meridian*, 299 U.S. at 115-16, it can also be argued that the jurisdictional appellate remedy "will lie in the penumbra of express statutory mandates." *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. at 457. *See also Touche Ross & Co.* v. *Reddington*, 99 S.Ct. 2479, 2485 (1979); *Davis* v. *Passman*, 99 S.Ct. 2264, 2274 (1979); and *Canon* v. *University of Chicago*, 99 S.Ct. 1946, 1961 (1979).

[18] This concept can be analogized to well-settled principle of pendant federal jurisdiction. *See United Mine Workers* v. *Gibbs*, *supra*. That two or more *federal* statutes are involved, rather than mixed federal and state issues, does not make protective jurisdiction any less applicable, any more than it would vitiate pendant jurisdiction. That term has been applied where the issue involved, not state claims joined to federal, but two federal claims normally handled differently within the federal court system. *See, e.g.*, *Romero* v. *International Terminal Operating Co.*, 358 U.S. at 380-81; *Rozado* v. *Wyman*, 397 U.S. 397, 402-05 (1970). *See generally*, Kurland, *The Romero Case and Some Problems of Federal Jurisdiction*, 73 HARV.L.REV., 817, 833-50 (1960).

Protective jurisdiction, as noted, may be particularly applicable in those areas which Congress has chosen specifically to regulate and for which it has provided both civil and criminal penalties. Therefore, if for no other reason than the fact that criminal penalties may attach, there can be no question as to these issues "arising under federal statute," thus invoking the jurisdiction of the appropriate statutory court. This conclusion, of course, springs from the black letter principle that there are no federal *common law* crimes. *See generally United States* v. *George,* 228 U.S. 14 (1913); *United States* v. *Eaton,* 144 U.S. 677 (1892); *United States* v. *Hudson & Goodwin,* 7 Cranch [11 U.S.] 32 (1812). Since federal criminal prosecutions must therefore rest on an *act of Congress* defining the crime, it is clear that all such cases "arise under" the laws of the United States within the meaning of the statutory and constitutional grant of jurisdiction to the federal court system. *See Tennessee* v. *Davis,* 100 U.S. 257 (1879). As already noted, therefore, jurisdiction will lie in any claim arising directly under an act of Congress, involving the construction of that statute. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 249 (1951).[19]

The denial of such plain and implicit jurisdiction by an appellate court, should therefore result in this Court's granting certiorari and ultimately vacating the intermediate judgment so that the lower court may explore

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[19] Thus, jurisdiction here is all the more compelling when applied to *statutory* and *regulatory* laws. The difference between the broader concept of "arising under the laws of the United States" (including common law) and the narrower concept of "arising under an act of Congress" (statutory law) is elaborated in *Enders* v. *American Patent Search Co.,* 535 F.2d 1085, 1088-89 (9th Cir. 1976). *Compare Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.,* 391 F.2d 486, 492-93 (2d Cir. 1968).

more fully "the legal significance" of those claims raised by Petitioners' briefs below. *See Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. at 677-78.

## CONCLUSION

Based on the fact that the intermediate court, due to its stringent interpretation of a clear statutory grant of its own jurisdiction, did not exercise jurisdiction plainly granted, thus depriving Petitioners of their right to due process of law under the Fifth Amendment to the United States Constitution, a writ of certiorari should issue to the Temporary Emergency Court of Appeals so that this Court may properly construe the jurisdictional statute.

Respectfully submitted,

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July 23, 1981

c.j.b.

# APPENDIX

## APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

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Nos. 10-29 and 10-30

---

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

W. DARRELL ZANG and LOUIS PORTER, *Defendants-Appellants.*

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Before INGRAHAM, ESTES and PECK, *Judges.*

Upon consideration of Appellants' Petition for Rehearing and Suggestion of Rehearing *En Banc,*

IT IS HEREBY ORDERED that said Petition and Suggestion are DENIED. The mandate shall be issued on July 1, 1981.

FOR THE COURT:

RUTH H. JACOBSON
*Clerk*

*/s/* DONNA M. BOLD
Donna M. Bold
*Chief Deputy Clerk*

*June 23, 1981*

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

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Nos. 10-29 and 10-30

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

W. DARRELL ZANG and LOUIS PORTER, *Defendants-Appellants.*

---

Appeal from the United States District Court
for the Northern District of Oklahoma

(No. SOCR-33-E)

Decided: May 22, 1981

B. HAYDEN CRAWFORD, Crawford, Crowe & Bainbridge, Tulsa, Oklahoma, HIRAM EASTLAND, Crosthwait, Terney, Noble & Eastland, Indianola, Mississippi, JOHN A. FIELD, III, Jerris Leonard & Associates, P. C., Washington, D.C., and JAMES C. LANG, Sneed, Lang, Adams, Hamilton, Downie & Barnett, Tulsa, Oklahoma, Attorneys for Appellants, W. Darrell Zang and Louis Porter.

HUBERT H. BRYANT, United States Attorney for the Northern District of Oklahoma, Tulsa, Oklahoma, and STEPHEN P. LEARNED, U.S. Department of Justice, Washington, D.C., Attorneys for Appellee, United States of America.

Before INGRAHAM, ESTES, and PECK, Judges.

PER CURIAM:

Defendants-Appellants, W. Darrell Zang and Louis Porter (hereinafter "Appellants"), appeal from the order entered on November 7, 1980 by the United States District Court for the Northern District of Oklahoma over-ruling a motion for judgment of acquittal, a motion for new trial, and a motion in arrest of judgment from the judgment of conviction and sentence of Appellants of sixteen counts of Title 18

U.S.C. felony offenses, i.e., conspiracy, mail fraud, wire fraud, and racketeering. An appeal of this action is also pending in the United States Court of Appeals for the Tenth Circuit (No. 80-2227).

The Court has carefully considered the motion of Appellee, United States, for dismissal of these appeals (Nos. 10-29 and 10-30), Appellants Zang and Porter's response thereto, and the Reply of the United States to the Memorandum of Appellants in Opposition to the Motion to Dismiss the Appeals. Based upon the reason and authority cited in this Court's decision of March 5, 1981 in TECA No. 10-26, *United States* v. *Zang and Porter,* — F.2d — , the Court concludes it has no jurisdiction of these appeals and that such appeals should be dismissed for want of jurisdiction.

In TECA No. 10-26 we dismissed Appellants' appeal of an order entered July 18, 1980 by the United States District Court for the Northern District of Oklahoma, which order denied Appellants' motions to dismiss a 16-count indictment (Appendix A to TECA 10-26 opinion) charging both Appellants with violations of certain general criminal statutes, Title 18 U.S.C. §371 (conspiracy), §§1341 and 2 (mail fraud and principals), §§1343 and 2 (wire fraud and principals) and §§1962(a) and 1963 [racketeering (RICO)].

In dismissing No. 10-26 we concluded that "this court lacks jurisdiction of this appeal and, in any event, the order of the district court appealed from . . . was correct, and appellants' request for issuance of this court's writ of mandamus ordering the district court to sustain their motions to dismiss the indictment should be denied and that this appeal should be dismissed." Slip Op. 13.

Our opinion in 10-26 states:

> "[T]he Temporary Emergency Court of Appeals (TECA) lacks jurisdiction of this appeal.
>
> Section 211(b)(2) of the Economic Stabilization Act of 1970 (ESA) provides that the Temporary Emergency Court of Appeals shall have "exclusive jurisdiction of all

appeals from the district court of the United States in cases and controversies ing under this title or under regulations or opinions issued thereunder." 12 U.S.C. §1904 note supp.). Section 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), as amended, 15 U.S. §754, incorporates and carries forward this of special jurisdiction.

The district court's July 18 order denying defendants' motions to dismiss the indictment is "case or controversy arising under the EPA amended." The Title 18 offenses charged in the indictment are not actions giving rise to TECA jurisdiction even if connected with regulatory violation *United States* v. *Cooper,* 482 F.2d 1393 (T 1973). In *Cooper* the defendant was indicted violations of regulations promulgated by the Economic Stabilization Act, by raising rents, failing to keep rent records, and by taking retaliatory against tenants. He was also indicted for making false statements in violation of 18 U.S.C. §100 lying about rent increases. At trial Cooper was acquitted on all counts except the false statement in violation of Title 18 U.S.C. §1001 and the charging him with taking retaliatory action against tenants. He appealed the conviction on these counts to the Ninth circuit which transferred the case the TECA. TECA concluded as follows:

> "We do not believe that the charge in 1, based on 18 U.S.C. §1001, arises within appellate jurisdiction of the TECA. We with the premise that a conviction under U.S.C. §1001 would be appealable only to a court of appeals, under 28 U.S.C. §1291, unless the Stabilization Act provides otherwise. We find nothing in Section 211(b)(2), of the Act which so provides. Section 211(b)(2) speaks of 'controversies arising under this title or under regulations or orders issued thereunder.' We do not think that Count 1, being based on 18 U.S.C. §1001, was a controversy

'arising under' any title of the Stabilization Act or under egulations or orders issued thereunder.

* * *

"The language in the Stabilization Act, 'in cases and controversies arising under this title' would require a loose construction in order to cover the charge in Count 1 of false representations on matters of rent control. Such a loose construction is unacceptable in light of the traditional rule that courts of special jurisdiction should strictly construe their statutory grants of jurisdiction.

"Moreover, there is no indication that Congress intended to include existing offenses, already covered by Title 18, under the umbrella of the Stabilization Act. There was surely no need for such double coverage. The ordinary criminal statutes remain available to the prosecutor, and in fact the prosecutor in this case used such statutes in the indictment against Cooper. (Footnote omitted)

"We therefore hold that the charge in Count 1, based on 18 U.S.C. §1001, was not a case or controversy arising under the Stabilization Act." 482 F.2d at 1397-1398.

In *Bray* v. *United States,* 423 U.S. 73, 96 S.Ct. 307 (1975), the Supreme Court stated with reference to Section 211(b)(2) of the ESA, as amended:

"This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and 'to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision.' S.Rep. N 95-507, p. 10 (1971), U.S. Code Cong. & Admin News 1971, pp. 2283, 2292.

* * *

"Nothing in the Act or in its legislative history indicates that Congress intended 'to include existing offenses,

already covered under Title under the umbrella of the Stabilization Act *United States* v. *Cooper,* 482 F.2d 1393, 13 (TECA 1973). Review in the TECA of criminal contempt convictions relating to compliary investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provision of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt regulation of Stabilization Act questions by burdening the TECA with additional appeals." (Footnote omitted) 96 S.Ct. 307, 309. Slip Op. 6

Page 9 of the slip opinion adds:

"Appellants [took] the position that TECA had jurisdiction of this appeal because 'the real ba of the controversy is the EPAA (15 U.S.C. §7 et seq.)' . . . and 'that U.S.C. §754 specification superseded or preempted the general criminal statute' . . ., thereby making this a case arising under the EPAA, as amended. . . ." Slip Op. 9.

This Court rejected that argument, stating:

The authorities cited in the district court order appealed from sustain the conclusion that the EPAA as amended in 15 U.S.C. §754 not supersede nor impliedly repeal the application of the provisions of the criminal statute with which defendants were charged in the indictment. Slip Op. 10.

* * *

Appellants have failed to show that Congress intended, in enacting the EPAA amendments of 1975, including 15 U.S.C. §754 which provides maximum misdemeanor criminal penalties for violations of the EPAA and regulations promulgated thereunder, to take away from the American people the protections afforded by the federal felony mail fraud, wire fraud, racketeering (RICO) and conspiracy statutes simply because defendants' conduct may also violate the EPAA providing misdemeanor

punishment with conditional one-year maximum term of imprisonment. Slip Op. 13.

Appellants make the patently erroneous contention that they were charged with willful violation of the EPAA miscertification regulations. They were not so charged. They were indicted by a grand jury, as mandated by the Fifth Amendment to the Constitution of the United States, and convicted in a jury trial of Title 18 U.S.C. felony offenses of conspiracy, mail and wire fraud and conducting a racketeering enterprise. Their guilt or innocence of the issues framed by the counts in that indictment are the only material dispositive issues in this case. Appellants' repeated efforts to have this court take over jurisdiction of Zang and Porter's appeals have resulted in delay in the disposition of these appeals by the Tenth Circuit Court of Appeals upon which Congress has expressly conferred jurisdiction under 28 U.S.C. §1291, and it is inimical to the goal of expeditious review of criminal cases for this Court to interfere with the Tenth Circuit Court in the disposition of these appeals.

Appellants' reliance on cases like *Citronelle-Mobile Gathering Inc* v. *Gulf Oil Corp.*, 591 F.2d 711 (TECA 1979), *cert. denied,* 444 U.S. 879, is misplaced. In that case Citronelle sued Gulf for the contract price of crude oil, and Gulf raised the affirmative defense of illegality of such price under the EPAA pricing regulations. The court in *Citronelle* stated:

> "[T]he resolution of the litigation in its enti requires application and interpretation of the EPAA of 1973, as amended Septeinber 29, 975. . . . '[C]onstruction of the EPAA . . . will control the litigation,' the determination of the proper price for crude oil in this case depends on the retroactive application *vel non* of the EPAA amendment *Citronelle-Mobile, supra,* at 716.

Appellants in the instant litigation raised no such affirmative defense. Obviously; a resolution of an issue where Zang and Porter violated an EPAA misdemeanor certification regula-

tion *would not* "resolve this [felony] litigation * in its entirety."

TECA has uniformly applied the traditional rule "courts of special jurisdiction should strictly construct their statutory grants of jurisdiction." *Texaco* v. *D.C.* 616 F.2d 1193, 1197 (TECA 1979), quoting *United States* v. *Cooper,* 482 F.2d 1393, 1398 (TECA 1973).

It is therefore ORDERED and ADJUDGED that appeals of Appellants, Zang and Porter, in TECA 10-29 and 10-30 be and are hereby DISMISSED IN WANT OF JURISDICTION.

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* "[O]f a far more general and important character, essential to the security of the [nation]." This court's opinion, p. 10, in TECA No. 10-26, *United States* v. *Zang and Porter,* — F.2d —, citing *Wood* v. *United States* 41 U.S. 342, 366 (1842).